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The State of South Carolina



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Opinion 85-4

January 21, 1985

The Honorable T. Moffatt Burriss
Member, House of Representatives
Box 55
Columbia, South Carolina 29202

Dear Representative Burriss:

You have asked our advice as to the following question:

If Section 14 of Article IV of the Constitution of South Carolina, 1895, is deleted, could that jeopardize South Carolina's death penalty statutes as being violative of the United States Constitution?

We would advise that, within the limitations set forth below, there would be no federal constitutional impediment to the removal of the clemency power contained in Article IV, Section 14.

Article IV, Section 14 provides as follows:

With respect to clemency, the Governor shall have the power only to grant reprieves and to commute a sentence of death to that of life imprisonment. The granting of all other clemency shall be regulated and provided for by law.

A brief background of the clemency power is in order.

It is well recognized that the "power to commute a sentence is part of the pardoning power...". 59 Am.Jur.2d, Pardon and Parole, § 65. And, the power to pardon

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...is a sovereign power inherent in the State or a governmental power inherent in the people who may, by constitutional provision, confer it on any officer, department or branch of the government as they see fit. It is not inherent in any officer of the State, or any department of the State.

67A C.J.S., Pardon and Parole, § 5.

Moreover, it is well settled that a commutation, being a form of pardon, is a mere matter of grace, mercy, privilege or favor...". 67A C.J.S., Pardon and Parole, § 32. As one court has stated, "pardon, parole or commutation is not a matter of right or privilege. It is a matter of grace or clemency only." Malloroy v. State, 435 P.2d 254, 255 (Ida. 1967). Our Supreme Court, likewise, has characterized clemency as an "act of grace." Crooks v. Sanders, 123 S.C. 28, 115 S.E. 760, 762 (1922).

Accordingly, clemency is "not a matter of right secured by the Constitution." So long as done uniformly, "[a] state can provide any system of commutation it desires". 67A C.J.S., Pardon and Parole, § 32. A prisoner possesses no constitutional right to have his sentence commuted or to be granted clemency. Mears v. State of Nevada, 367 F.Supp. 84 (D.Nev. 1973).

Only recently, the United States Supreme Court addressed the question of whether the Due Process Clause of the United States Constitution gives a prisoner any federally protected rights to clemency. The Court held that it did not. In Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 69 L.Ed.2d 158 (1981), the Court stated that "[t]he mere existence of a power to commute a lawfully imposed sentence ... creates no right or entitlement." 452 U.S. at 466. The Court thus concluded that an inmate has "no constitutional or inherent right" to commutation of his sentence. Supra at 464.

Neither is it "cruel and unusual" punishment to impose the death penalty without the possibility of commutation or clemency. We have found no case which holds that a State is required by the Eighth Amendment of the United States Constitution to maintain a procedure for granting clemency in order to impose the death penalty. To the contrary, it was stated in the Dumschat case, supra, that clemency may be denied "even for no reason at all." 452 U.S. at 467 (Brennan, J., concurring).

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Thus, in Smith v. Snow, 722 F.2d 630 (11th Cir. 1983), the Eleventh Circuit recently concluded that the Eighth Amendment is not violated if the death penalty is inflicted even after the pardoning power has, in refusing clemency, exercised "unfettered discretion." As the Court noted, refusal to grant or even consider granting clemency "can never cause the imposition of the death sentence." Instead, clemency "serves only as an act of grace to relieve that sentence even when the sentence has been lawfully imposed." 722 F.2d at 632. It follows then, that if there is no Eighth Amendment violation where the pardoning power may simply refuse to consider clemency in any given instance, likewise it is not cruel and unusual punishment to impose the death penalty where any provision authorizing clemency or commutation has been removed.

Therefore, we conclude that a constitutional amendment deleting Article IV, § 14 of the State Constitution, and thus removing the Governor's present clemency power, generally would raise no federal constitutional objection. Such would be within the province of the General Assembly and the people of this State, as a matter of State law and public policy. Accordingly, a court would most probably conclude that a constitutional amendment removing the clemency power is generally valid under federal law.

As an additional comment, we would note that a recent case, decided by the United States Supreme Court, might constrain our courts, under the ex post facto clause of the Federal Constitution, to apply such amendment prospectively only, as you have indicated. A court could be required under the Supreme Court's holding in Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 24 (1981) ^{1/} to conclude that any repeal of Article IV, § 14 is inapplicable

^{1/} There is other authority, however, which concludes that the retroactive removal or reduction of the commutation power poses no ex post facto problem. See, Singleton v. Shafer, 313 F.Supp. 1094 (E.D.Pa. 1970); Dunn v. Massio, 712 F.2d 998 (5th Cir. 1983), cert. den., 104 S.Ct. 1297 (1984). These cases, which have upheld such removal retroactively, have reasoned that clemency or commutation is a matter of grace only, and thus it does not enhance a prisoner's punishment to remove his right to seek a commutation of his sentence, even if he committed an offense (for which the death penalty was received) prior to the effective date of the provision adversely affecting such right.

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to those persons committing offenses (for which the death penalty was received) prior to the effective date of the new provision. 2/

In conclusion then, we would advise that, within the limits set forth above, there would be no federal constitutional impediment to the removal of the clemency power contained in Article IV, Section 14 of the State Constitution.

If we can be of further assistance, please let us know.
With kindest regards, I remain

Very truly yours,



Robert D. Cook
Executive Assistant for Opinions

RDC:djg

2/ Of course, as to these persons, the granting of clemency would still be a matter of grace solely within the discretion of the Governor and his decision could not be reviewed by the courts. 67A C.J.S., Pardon and Parole, § 5.